

Decision of the Independent Judicial Officer

ERC

Decided on written submissions only

18 April 2011

In respect of

Biarritz Olympique Pays Basque ("the Club")

And

A Misconduct complaint that the Club failed or refused to pay the sum of €87,325.55 to Ospreys by the due date of 10 December 2010 (which due date was stipulated in the ruling of ERC's Chief Executive pursuant to clauses 9.2.3, 9.2.4.2 and 9.2.5 of the Commercial Rules of the 2009/10 Heineken Cup Participation Agreement), more particularly by (a) failing or refusing to pay €58,979.55 until around 27 December 2010, and (b) failing or refusing to pay the remaining €28,376.00 (and interest) at all.

Judicial Officer appointed to hear the case:

Rod McKenzie (Scotland)

Decision of the Judicial Officer:

- (i) the Club must pay to Ospreys by no later than 1 May 2011 (a) the outstanding amount of €28,076 plus interest from 17 December 2010 until paid; and (b) the interest which accrued between 17 December 2010 and 27 December 2010 as a result of the late payment of €58,979.55 (all interest to be on the terms and at the rate specified in Commercial Rule 9.2.4.2);
- (ii) the Club is fined €1,000, such sum to be paid within 14 days of the date of this decision; and
- (iii) the Club is responsible for all reasonable costs incurred by ERC in raising and processing the Misconduct complaint.

Introduction and background

The Judicial Officer was appointed by Professor Lorne D Crerar, Chairman of the ERC's independent Disciplinary Panel pursuant to the Disciplinary Rules found in the Participation Agreement of the Heineken Cup 2009/2010. The Judicial Officer was appointed to consider the Misconduct complaint ("the Complaint") arising out of the quarter final match played between the Club and Ospreys on 10 April 2010 in the Heineken Cup 2009/2010 ("the Match"). All parties agreed that there was no requirement for an oral hearing and that the Judicial Officer's determination should be on the basis of written submissions. The Club replied in writing to the Misconduct complaint on 7 March 2011 and the ERC thereafter responded on 21 March 2011 by way of written submissions. The Club made its final written submission to the Judicial Officer on 28 March 2011 by way of email. All written submissions and accompanying documents have been carefully considered and taken account of in arriving at the Decision in this matter.

On 10 April 2010 the Club played against Ospreys in a quarter final match of the 2009/10 Heineken Cup at Estadio Anoeta. The arrangements regarding distribution of revenue for quarter final matches is as set out in clause 9.2 of the 2009/10 Heineken Cup Commercial Rules ("the Commercial Rules"), which form part of the 2009/10 Heineken Cup Participation Agreement. On the basis that Estadio Anoeta was not the Club's Normal Home Venue (as defined in the Commercial Rules) and pursuant to clause 9.2.5 of the Commercial Rules, the revenue split for the Match would, in ordinary course, have been 65% of the Net Gate Receipts to the Club and 35% of the Net Gate Receipts to Ospreys.

The Club submitted to ERC and Ospreys under clause 9.2.3 of the Commercial Rules, in or around early June 2010, various documents relating to the finances of the Match. Clause 9.2.3 obliges the home club to:

"maintain full and proper accounting records in relation to costs and receipts for the Quarter-Final Match. No more than 28 days after the Quarter-Final Match, the home Club shall submit to ERC and the visiting Club a report showing the amount of the gross gate receipts and the costs incurred in staging such Match and all deductions and calculations used in determining such amounts. Such report shall be accompanied by a letter prepared by a reputable firm of chartered accountants, certifying that the firm has audited the report and believes it to be fair and accurate. The home Club shall upon request allow representatives of the visiting Club full access to all accounts and accounting records considered by the firm in the preparation of its report. Any objection by the visiting Club to the accuracy of the figures in the report, to be valid, must be made to the Chief Executive of ERC within 21 days of receipt of the report and must be accompanied by a statement of reasons for the objection. The Chief Executive of ERC shall rule on any valid objection made by the visiting Club..."

According to the financial statements as submitted by the Club, the 35% of Net Gate Receipts due to Ospreys was €165,362.36. From this amount the Club deducted "Location", (ticket sales commission in France) of €4,208.19 and deducted tickets sold by Ospreys of €48,815 as Ospreys retained this sum. There was no objection by Ospreys to either of these deductions. The Club, however, deducted a further €95,040 from the amount due to Ospreys leaving a balance of €25,715.22. The Club, explained in its response to the Misconduct complaint dated 7 March 2011 that it decided to retain the sum of €95,040, being the claimed value of the late returned tickets. On 15 June 2010 Ospreys raised a series of objections to the calculations.

As outlined in the Misconduct complaint, the Judicial Officer noted that Ospreys had already been subject to a separate Misconduct complaint in respect of the Match which arose out of its failure or refusal to comply with its obligation to return a number of unsold Match tickets to the Club, on time, pursuant to clause 7.6.3 of the Commercial Rules. A sanction was imposed on the Ospreys by decision dated 8 December 2010.

As outlined in the Chief Executive of ERC's letter to the Club dated 27 August 2010 the match was not a sell out and there were a number of tickets that remained unsold after kick off (aside from the tickets returned late by Ospreys). There were 233 €55 tickets, 4,366 €45 tickets and 70 €15 tickets left unsold after kickoff. The categories of €35 and €25 tickets were sold out. Ospreys returned 38 €55 tickets, 1,125 €45 tickets, 510 €35 tickets, 634 €25 tickets and 575 €15 tickets. The combined value of the €35 and €25 tickets which were returned late by Ospreys was €33,700.

In accordance with clause 9.2.3 of the Commercial Rules the Chief Executive of ERC issued a ruling on the matter on 9 November 2010 ("the Ruling"). He concluded that, at best, the Club might have sold all of the €35 and €25 tickets if they had had the opportunity to sell them. The Club was therefore to pay the sum of €87,325,55 to Ospreys in final settlement of the match account within 21 days of the ruling (i.e. by 10 December 2010). This amounted to a deduction of €33,430 rather than €95,040 and was attributed to the value of the €35 and €25 tickets that were returned late by Ospreys. It has now been conceded by ERC that there was a minor arithmetical error in calculating the amount to be deducted and that this figure should instead be €33,700.

The Club has failed to make the payment, in full, to Ospreys pursuant to the Ruling. It is the Judicial Officer's understanding that the Club has made a payment of only €58,979.55 to Ospreys in or around the week beginning Monday, 27 December 2010 which is €28,346 less than the full amount ruled to be payable, and in any event after the due date.

Clause 10.2 of the Commercial Rules states:

"in the event of any other or further breach by the Club of these Commercial Rules, or if ERC reasonably believes that the Club is failing to comply with its obligations under these Commercial

Rules, ERC may (at its election) bring disciplinary proceedings against the Club in accordance with the Disciplinary Rules, and/or claim damages and/or terminate the Participation Agreement entered into by the Club and/or suspend or expel the Club from the Tournament."

The Disciplinary Officer brought a Misconduct complaint against the Club pursuant to rules 4.1.5 and 6.6.3 of the Disciplinary Rules.

Decision

By signing the 2009/10 Participation Agreement the Club accepted and agreed to be bound by, to observe and to comply with the Terms and Conditions of the Tournament, see clause 1.4.1 of the Participation Agreement. By clause 1.1.2 of the Participation Agreement the Commercial Rules are part of the "Terms and Conditions".

The Judicial Officer agrees with the Disciplinary Officer that there was a requirement for the ERC's Chief Executive to make a ruling in this case, Ospreys having made an objection to him under clause 9.2.3 of the Commercial Rules. As the Disciplinary Officer correctly points out, clause 7.6.3 of the Commercial Rules sets out the sale or return nature of the tickets that are provided to a visiting club and the deadline for returns, but it does not specify how revenue relating to such tickets should be treated in the event of a late return of tickets in breach of that clause. Ospreys were therefore entitled to object to the accuracy of the figures in the Club's report on the Match accounts on the basis it disputed the way the Club treated the claimed loss of revenue relating to unsold Match tickets.

Clause 11 of the Commercial Rules is not applicable to this matter on the basis that clause 9.2.3 expressly provides for a ruling by ERC's Chief Executive where the visiting club objects to the accuracy of figures in a report on quarter-final match accounts. The Chief Executive of ERC was entitled to make the Ruling.

The effect of a ruling made by the Chief Executive or the ERC is to result in an obligation on the host club to pay the sum determined to be due in such a ruling in accordance with clause 9.2.4.2 of the Commercial Rules. If payment is not made then an obligation to pay interest on the sum due arises as per the same clause. It is not open to the Judicial Officer, even if he were minded to do so, to interfere with or vary the Ruling. These proceedings are not concerned with the correctness or otherwise of the Ruling. It is no part of the function of the Judicial Officer to adjudicate on the Ruling since he has no jurisdiction to do so. The Ruling having been made, the obligation to make payment provided for in clause 9.2.4.2 is the consequence. Notwithstanding that clause 9.2.3 of the Commercial Rules does not provide that such rulings are final and binding, the Participation Agreement does not provide for a mechanism for review of such rulings.

Failure to pay a sum due by the Participation Agreement is breach of the Participation Agreement and is Misconduct for the purposes of Disciplinary Rule 3.3.2. It is also Misconduct by such failure not being in accordance with the Participation Agreement (see Disciplinary Rule 3.2).

The Judicial Officer has therefore concluded that the Club is guilty of Misconduct and the complaint be upheld. In all of the circumstances, the Judicial Officer has determined that the appropriate sanction is for a compensation payment to be made by the Club to Ospreys by no later than 1 May 2011 in the sum of €28,076, plus interest as specified together with the interest as specified which accrued between 17 December 2010 and 27 December 2010 in respect of the late payment of the €58,979.55. The Judicial Officer considers it appropriate to impose a fine of €1,000. The limited level of fine reflects that Ospreys will be fully compensated by the compensation payment and the interest payable on same and that the essence of this case concerns whether the Club is or is not under obligation to pay the sum of €28,076. It would be preferable if the Participation Agreement were to contain a mechanism by which such an obligation could be enforced without recourse to a Misconduct complaint. The compensation is to be paid by the Club to Ospreys as specified and the fine is to be paid by the Club to ERC no later than 14 days of the date of this decision.

The ERC should consider whether:

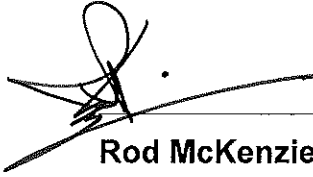
- a) to provide a mechanism for review of rulings by the Chief Executive under Commercial Rule 9.2.3 by the Board or some other person or body, there being no mechanism for an aggrieved part to refer a matter to the Board for review in terms of clause 3.10 of the Participation Agreement, and such rulings by the Chief Executive not being expressed as final and binding;
or
- b) to specify that a Chief Executive's ruling for the purpose of Commercial Rule 9.2.3 is final and binding; and, in any event,
- c) to provide a mechanism for enforcement of contractual obligations arising under the Participation Agreement without recourse to a Misconduct complaint.

Costs

The Club is responsible for all reasonable costs of the ERC in raising and processing the Misconduct complaint.

Appeal

Both parties are reminded of their right to appeal against this decision.



Rod McKenzie
Judicial Officer

18 April 2011